United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1231

To Be Argued by
PHILIP PELTZ

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P/P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA,
Plaintiff-Appellee

Docket No. 75-1231

-v-

MILTON NUSSEN,
Defendant-Appellant

----------X

Appeal From The United States District Court
For the Eastern District of New York

BRIEF FOR THE APPELLANT

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CAROL MELLOR
On The Brief

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BRIEF FOR APPELLANT

Statement of the Issue Presented for Review

Whether the trial court erred in allowing the prosecution to introduce into evidence statements made by appellant after arrest and after appellant was told by the arresting officer that nothing he said would be used against him.

Statement of the Case

Milton Nussen was indicted (74 CR 784) on a three-count indictment charging two substantive counts of violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 and one count of conspiracy to violate these sections arising out of a sale of 11,000 tablets of Phentermine to an undercover agent on

July 16, 1974. Jury trial was held before Judge Thomas C. Platt, U.S.D.J., beginning on April 9, 1975. The jury acquitted the appellant as to the substantive counts, and convicted as to conspiracy.

A Rule 33 motion for a new trial on the ground that statements admitted into evidence were obtained in violation of appellant's Constitutional rights was denied on June 20, 1975 and the appellant was committed to the custody of the Attorney General pursuant to 18 U.S.C. §5010B until discharged by the Federal Youth Correction Division and the Board of Parole. Bail was continued pending appeal.

Statement of the Facts

At trial, the following facts were adduced:

On April 15, 1974, Agent DeGravio, acting in an undercover capacity, met with one Mark Risucci in a diner on Long Island (April 10, 1975 at 9). Risucci gave DeGravio a sample of pills and arrangements were made to purchase a larger supply (April 10, 1975 at 10). On July 16, 1974 after telephone communication, DeGravio picked up Risucci at 8:00 P.M. in Northport, Long Island and they proceeded to a parking lot in Brooklyn where a sale of 11,000 pills was to take place (April 10, 1975 at 11-13). There, they were met by Jerome Rudish and the transfer of pills was completed in a gold-colored automobile at the parking lot (April 10, 1975 at 13-20). Rudish and Risucci were then arrested at

approximately 9:30 P.M. (April 10, 1975 at 19). Rudish stated under questioning and at trial that Milton Nussen was the source of the pills and had orchestrated the deal (April 9, 1975 at 40-50). There was testimony to the effect that Milton Nussen had reported the gold-colored automobile stolen (April 10, 1975 at 86-98). Milton Nussen was arrested in December of 1974 (April 10, 1975 at 24). After having twice been advised of his rights, appellant made certain statements including that he had reported the gold-colored car stolen (April 10, 1975 at 25-31). These statements were admitted on the Government's direct case. The defense presented one witness, Mr. Thomas Romanelli, who testified that on the evening in question, July 16, 1974, Milton Nussen had, in his capacity as real estate salesman, accompanied Romanelli to two houses, and that they had been together continuously from around 8:00 P.M. until approximately 9:30 that night (April 10, 1975 at 122-128).

In rebuttal, the prosecution recalled Agent DeGravio who, after a hearing at which admissibility was found, testified that after the statements he had earlier testified to were given, Milton Nussen indicated he wanted to cooperate. DeGravio told Milton Nussen at this time

> "At this time Mr. Nussen questioned the fact of whether what he said at this time would be used against him to further develop a more encompassing case involving any drug dealings, and other transactions he had engaged in previous or subsequent to

> July 16, 1974. Mr. Nussen and I shook hands at this time. I informed him that what he said would not be used against him. That we were at this time attempting to further the case in order to reach the source of supply of the 11,000 stimulant tablets. That I was not interested in developing a tighter case on Mr. Nussen." (April 14, 1975 at 44).

DeGravio then stated that Milton Nussen made statements identifying his source of supply, indicating that he was thinking of using an alibi witness and indicating that he was present in the parking lot on July 16, 1974 (April 14, 1975 at 45-46).

Argument

ADMISSION OF THE STATEMENTS OF APPELLANT MADE PURSUANT TO A PROMISE OF IMMUNITY VIOLATED THE FIFTH AMENDMENT.

A. Preliminary Statement

The statements made by defendant after he had been told that nothing he said would be held against him were inadmissible, either as substantive rebuttal evidence or under the theory of impeachment of the defense witness. As a matter of law, the statements were coerced and involuntary in that they were extracted under a promise of use immunity. Admission of this evidence violated the appellant's Fifth Amendment protection against self-incrimination.

Although the court may have couched his ruling in terms of admission as impeachment testimony, the evidence was admitted as substantive evidence in rebuttal. The confusion is de minimus, however, because as shown below, the evidence was inadmissible under any theory.

B. The Nature of the Promise

There is no doubt that the agent told the appellant that nothing he said would be used against him (April 14, 1975 at 23, 44). Analysis of the import of the agent's representations is crucial to a determination of whether the agent's promise is the type which would cause the statements made in response thereto to be deemed involuntary as a matter of law.

When Miranda took the Fifth Amendment privilege into the police station, it forged a unity between the traditional testimonial compulsion, as found in the various immunity statutes and the rule against admission of coerced confessions. Miranda v. Arizona, 384 U.S. 436, 460-463 (1965). Wigmore notwithstanding,(1) the Supreme Court held that the prohibition against use of testimony compelled by the exercise of an immunity statute and the prohibition against use of coerced confessions sprung from the same well, it being the Fifth Amendment. The similarities between the two types of

(1) See dissent in Miranda and Wigmore's analysis of variant histories of the two rules. Miranda v. Arizona, supra at 510, 8 Wigmore, Evidence, §2266 (McNaughton rev. 1961)

compulsion have not gone unnoticed. In Kastigar v. United States, the Supreme Court stated that "the statutory perscription [against use of compelled testimony] is analgous to the Fifth Amendment requirement in cases of coerced confessions." Kastigar v. United States, 406 U.S. 441, 461 (1972). In either case, the defendant is protected from use and derivative use of his compelled statements. Kastigar v. United States, supra at 461. Both principles are here relevant in that the representation made to the appellant had the effect of a grant of immunity which resulted in a coerced confession.

The words used by the agent, "nothing you say will be used against you" are equivalent to a representation of immunity. These words actually echo the words of the Federal Immunity Statute, 18 U.S.C. §6002.(2) Beyond that, they are in direct contradiction to the words of the Miranda warnings, which are designed to inform the accused of his rights and risks under the United States Constitution. The importance of the wording cannot be over-emphasized. They import, in law and in common usage, the idea of immunized conversation; of speech without jeopardy. Legally, the words estop the

(2) "No testimony . . . compelled under the order . . . may be used against the witness in any criminal case."

Government from use or derivative use of the testimony. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Kastigar v. United States, supra. To the appellant, these words could only have meant that he could speak freely, without risk.

An accused who speaks to officers after having been warned usually risks the use of that conversation at a trial at which he is defendant. An accused who speaks to officers after having been warned has been told, and theoretically understands, that anything he says can and will be used against him. Here, the agent took upon himself to not only nullify the standard warnings, but to waive the Government's right to use Milton Nussen's statements against him. The agent said the magic words which, spoken pursuant to 18 U.S.C. §6002, in a court proceeding, would have absolutely barred the use of any of the statements. The absence of the statutory parameters of the immunity statute does not change the import of the words to an accused in custody, nor should it change the affect. What occurred here is similar to what occurrs in a Grand Jury proceeding or a trial wherein immunity is conferred. The officer decided that information Milton Nussen may have had was more important than continuing to build a case against him and manifested that decision in a representation of immunity. A specific purpose of immunity statutes is that "the only persons capable of giving useful testimony are those implicated in the crime." Kastigar v. United States, supra at 446. Agent DeGravio stated to Milton Nussen that his

purpose in continuing the questioning and using the words he used were in an attempt "to further the case in order to reach the source of supply" (April 14, 1975 at 44). And to preserve the Fifth Amendment, the price the Government must pay in either case for the opportunity to obtain this information is to be barred from using such information against the speaker. Kastigar v. United States, supra at 460.

C. The Effect of the Promise

Despite the apparent similarity of the language and purpose recited by the Government agent in the case at bar to the wording and purpose of the immunity statutes, that statutory immunity was not here conferred. The failure of an actual conferral of immunity will not result in the admission of such statements, the rule being that coerced confessions must be excluded.

Many decisions, in this and other jurisdictions, have considered the effects of various promises by agents of the Government on the voluntariness of confessions. It is clear that the all-encompassing wording of Bram v. United States, 168 U.S. 532 (1897), that no "promises, however slight" is not the standard. Thus, in this Circuit, a promise of reduced bail was held to be "not the kind of inducement or promise that would by itself make the confession involuntary." United States v. Ferrara, 377 F.2d 16, 18 (2d Cir. 1967), cert. denied, 389 U.S. 908 (1967); and neither was a statement that a defendant

is his own best lawyer where no specific promises were made. United States v. Pomares, 499 F.2d 1220 (2d Cir. 1974). The Fourth Circuit has gone so far as to allow an agent to tell a defendant

> "If he testifies about the criminal activity of others, he may be granted immunity for his testimony, obtain a dismissal of cumulative counts, or at the very least obtain a recommendation of leniency from the prosecutor." United States v. Williams, 479 F.2d 1138 (4th Cir. 1973), cert. denied, 414 U.S. 1025 (1973).

Agent DeGravio did not state that immunity might be granted, he unequivocally purported to grant it.

Since the Miranda ruling, the words "involuntary" or "coerced" have conjured images of brutality, deprivation and psychological duress. Thus, even when the alleged involuntary confession is the product of an inducement, as was the case in Ferrara, the test is worded in terms of overbearance of the will to resist. United States v. Ferrara, supra; Rogers v. Richmond, 365 U.S. 534, 544 (1961). Voluntariness is a broader concept than this might indicate. Whereas, "for many years, wide spread professional usage equated the term 'voluntary' with 'reliable' or 'trustworthy' or 'truthful'... . this common law connotation of the term 'voluntary' cannot be accepted as the modern meaning" 3 Wigmore, Evidence §826 (Chadbourn rev. 1970). The term voluntary, as a word of art, has been defined by one Supreme Court Justice to be

> "An understandable label under which can be readily classified the various acts of terrorism, promises, trickery and threats which have led this and other courts to refuse admission as evidence to confessions." McNabb v. United States, 318 U.S. 332, dissent at 348 (1942).

Voluntariness, as a legal concept, has been removed from the idea of truth. Exclusion of involuntary confessions

> "This is not so because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that our's is an accusatorial and not an inquisitorial system - a system in which the States must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, supra at 540-541 (1961).

It is not necessary to attempt to fit a confession induced by a promise of immunity into one or more unclear definitions of voluntary because the Supreme Court has already held such a confession to be coerced. In Shotwell Mfg. Co. v. United States, the Court stated:

> "It is of course a constitutional principle of long standing that the prosecution 'must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.' Rogers v. Richmond, 365 U.S. 534, 541. We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment. [Citations omitted]

> . . . Evidence so procured can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychological coercion." Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-348 (1963).

There has never been any question about this in American jurisprudence. Although England may have only firmly established the rule in 1880, according to Wigmore, "In the United States such promises have always been regarded as vitiating the confession." 3 Wigmore, Evidence, §834 (Chadbourn rev. 1970). This Court had the opportunity to decide this question in United States ex rel. Burke v. Mancusi, 331 F. Supp. 1246 (S.D.N.Y. 1971), aff'd, 453 F.2d 563 (2d Cir. 1971), but it decided the case on other grounds and has never reached this exact issue. Judge Weinfeld, in the case of United States ex rel. Caserino v. Denno, did consider the question and decided, relying on Shotwell, supra, that such a confession was coerced. United States ex rel. Caserino v. Denno, 259 F. Supp. 784 (S.D.N.Y. 1966).

Testimony extracted under a grant of immunity is characterized as "compelled testimony." The statements of defendant here were no less compelled. That the Government may and does compel testimony is conceded. But the Government cannot do so without preserving the speaker's Fifth Amendment rights. The absolute necessity for preservation of these rights mandates an exclusionary ruling precluding the

Government from using the statements against the speaker.

Judge Weinfeld's decision raises and provides the answer for the question of the effectiveness of the immunity. "What is important," said he, "is not whether the state official who obtains the confession is officially authorized to engage in the conduct by which the confession is obtained, but whether he appears to the accused at the time the confession is made to be a person in authority." United States ex rel. Caserino v. Denno, supra at n. 24. The agent here was undoubtedly a person who represented and was clothed with governmental authority in the eyes of the appellant; he had just been arrested by the agent. cf. United States v. Solomon, 509 F.2d 863 (2d Cir. 1975) where this Court's analysis emphasized the importance of the interrogator being a government agent.

In the Fifth Circuit, the Court of Appeals affirmed a conviction wherein at the trial, the trial court ruled out any admissions made after the detective assured Strickland that his only interest was in the assault aspect of the case. On appeal, the major question was whether the assurance had been given at the beginning or toward the end of the interview. Defendant, who had been severely beaten in connection with the drug deal, tried to assert that the assurances were given at the very beginning of the interview. Rejecting that contention, the Circuit Court of Appeals did, however, accept

the trial court's exclusion of all statements made after the assurances were found to have been given. United States v. Strickland, 493 F.2d 182 (5th Cir. 1974).

The remaining consideration is whether the promise "brought about" the confession. Shotwell Mfg. Co. v. United States, supra at 343. It is clear from the testimony of Agent DeGravio that not only was the statement brought about by the promise, but that was his purpose (April 14, 1975 at 10-11).

The trial court refused to grant a new trial pursuant to a Rule 33 motion despite his finding that

> "They [the agents] indicated very clearly to him in the two warnings they gave him that it would be used - any testimony, any statements he made would be used against him.
>
> . . .
>
> Then he made certain statements that were against his interest and they said All right, in view of this now would you like to go further and anything further we won't use against you." (June 20, 1975 at 7, emphasis supplied.)

It is the "further" statements which are at issue here. The trial court erred in refusing to grant a new trial on this basis because it found the operative facts to be that the agent had promised immunity, and that Milton Nussen made statements in reliance thereon. Trial counsel conceded the proper use of the original statements; it is only the later statements which were at trial, and are now, being challenged.

The trial court also tried to support its refusal to grant a new trial on the alleged "context" of the promise. It stated that

> "What Mr. DeGravio was saying was that he made no promise that he would not be prosecuted or that anything he said would not be used in connection with the case as to which they already had him, so to speak, but that they wouldn't use anything he said to add to that case against him in terms of building or adding additional counts in the indictment and indeed they didn't. . . " June 20, 1975 at 4.

The trial court supported this finding by reading the following testimony which had been originally elicited at the hearing:

> "What you said, as I believe you did on cross-examination at one point, that the statements he made, the further statements that he made, were not going to be used against him, was that made in a context not going to be used against him in this case or not going to be used against him in building a larger case as you heretofore indicated?
>
> THE WITNESS: I meant it that what he said - -
>
> THE COURT: Not what you meant, what context was the statement made in?
>
> THE WITNESS: The context that it was made that what he said would not be used against him to develop an entire case or a larger case. It would not be used to drag in other narcotic transactions of other types of incidents that had occurred. What we needed from him was an assurance that he in fact could help us to further this case to get the source of supply.

THE COURT: It was made in that context?

THE WITNESS: That context."
June 20, 1975 at 3-4.

In deciding the motion, the trial court totally ignored the following, which was also part of the hearing:

> "Q. You just told Judge Platt what you claimed the context of the statement was - that it would not be used to tighten the existing case against this defendant; is that correct?
>
> A. I also stated more than that. I said to enlarge, to entrap the individual, where he felt as though we were still working on him. We were no longer working on Milton Nussen." April 14, 1975 at 32.

The attempt to limit the promise is simply unsupported by the agent's testimony. Even if Nussen's fear, was as the agent testified, expressed in terms of other transactions, the agent at both the hearing and the trial stated unequivocally that his promise encompassed the crime already charged also.(3)

Assuming, but not conceding, that the trial court's finding of fact was supported by the evidence as to the context of the promise as expressed by the agent, the statements

(3) Hearing: "We were no longer working on Milton Nussen" (April 14, 1975 at 32)

Trial: "That I was not interested in developing a tighter case on Mr. Nussen." (April 14, 1975 at 44.)

should still have been excluded, again based on Judge Weinfeld's decision in Caserino. In that case, the prosecution argued that the promises of immunity were conditional in that the defendant to whom the promises were made was told he would not be charged with homicide and he wasn't; he was charged with possession of a weapon and accessory to a felony. Judge Weinfeld said that

> "To accept the state's fine spun distinction as to the restricted meaning of the detective's statement is to fly in the face of reality. To accept it is to attribute to this defendant, or for that matter to any other layman of his age, experience and predicament at the time of questioning, the acuteness of an old common-law pleader, familiar with the 'nice sharp quillets of the law' with knowledge of the suitable distinctions among various crimes. . ." United States ex rel. Caserino v. Denno, supra at 791.

These words are most apposite in this instance. The trial court first on the basis of a legalistic contract principle (see transcript of June 5, 1975) and then on a distinction between "the case on which they had him" in terms of adding counts as contrasted to use to convict on counts already charged, tried to justify his decision. Neither rationale can stand in the face of the clear import the words and the action had to the agent and must have had to the defendant, an uncounselled 22 year old, with one minor conviction in his past, who had just been arrested. Milton Nussen was entitled to rely, and indeed rely on the agent's

representation that "nothing he said would be used against him."

D. Use of the Statements as Impeachment Evidence

At trial and on the argument of the Rule 33 motion, the Government attempted to justify the admission of these statements as evidence on the basis of the Harris impeachment doctrine. The Supreme Court decided, in Harris v. New York, 401 U.S. 222 (1971), that a statement of a defendant, inadmissible as substantive evidence because of a Miranda violation, could be used to impeach the credibility of a testifying defendant as a prior inconsistent statement. There are factual, constitutional and evidentuary reasons why this justification is unsupportable.

First of all, the evidence was not limited to impeachment evidence. The trial court cautioned the jury that the evidence "is to be restricted in your minds solely to this particular case and not to be taken beyond this case in any way, shape or form." (April 14, 1975 at 42). This Evidence was introduced as direct, substantive evidence. Harris and its progeny do not purport to allow admission of constitutionally defective statements as direct, substantive evidence. Harris merely allows the credibility of a defendant witness to be tested by use of a prior inconsistent statement. On a Constitutional level, Harris is inappropriate. The

petitioner in Harris made "no claim that the statements made to the police were coerced or involuntary." Harris v. New York, supra at 224. As reiterated in Oregon v. Hass, the statement which is to be used to impeach the defendant must first be measured on the traditional standards of voluntariness and trustworthiness. Oregon v. Hass, ____ U.S. ____, 95 S.Ct. 1215, 1221 (1975). The statements here elicited were involuntary as a matter of law (see pp. 8-12, infra) and therefore could not be used to impeach credibility under Harris.

Finally, the use of the Harris rationale is precluded on evidentuary grounds. The defendant never took the stand. His credibility was not in issue. The statements could only be used to impeach the defendant if he "took the witness stand and gave testimony at variance with what he said in the statement. [To permit] use of the statement in rebuttal as substantive evidence is contrary to Miranda and cannot stand." State v. Davis, 67 N.J. 222, (1975). In United States v. Hale, ___ U.S. ___, 17 CrL 3094 (1975), the Supreme Court also held, on an evidentuary basis, that silence during questioning could not be used under a Harris theory because "A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent" United States v. Hale, supra at 3095. Nussen never testified and therefore there was no

basis for use of a prior inconsistent statement, there being no subsequent statement with which to compare it.

E. Effect of Admission of Coerce Statements

Admission of the coerced statements tainted the verdict of the jury and requires that defendant be given a new trial. Acquittal on the substantive counts and conviction on the conspiracy count indicate the jury's rejection of evidence tending to show Milton Nussen was at the scene. The statements admitted erroneously tended to impute to Milton Nussen a knowledge of the sources of the drugs and a further involvement in this and other drug dealings. It cannot be said that the admission of this testimony was harmless beyond a reasonable doubt which must be shown so as to label "harmless" an error of Constitutional dimension. Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

Admission into evidence of the statements of appellant made by him pursuant to a promise of immunity violated the Fifth Amendment. Appellant must be given a new trial.

Respectfully submitted,

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